32981 SERVICE DATE - SEPTEMBER 4, 2002
EB

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 638

PROCEDURES TO EXPEDITE RESOLUTION OF RAIL RATE CHALLENGES TO BE CONSIDERED UNDER THE STAND-ALONE COST METHODOLOGY

Decided: September 3, 2002

OVERVIEW

The Surface Transportation Board (Board) proposes to amend its regulations at parts 1109 and 1114 to further expedite the resolution of rail rate challenges considered under the stand-alone cost (SAC) methodology. In recent years, we have focused much of our energy on streamlining and simplifying the rate complaint process. For major rate cases, we have issued processing deadlines, we have put limits on discovery, we have developed a standardized procedure for submitting SAC evidence, and we have simplified the market dominance procedure.[1] Nevertheless, concern about delays in getting large rate cases resolved continues to be a significant topic of discussion before both the Board and Congress.

A variety of factors can contribute to the time it takes to complete these cases. At the outset, it should be noted that rate cases are highly complex proceedings, as our governing statute directs us to take into account and harmonize many sometimes conflicting considerations. Thus, even under the best of circumstances, these rate disputes cannot be resolved as quickly as some might like.

Sometimes rate cases are delayed by the way in which the regulatory process is structured or used. Recently, for example, disputes that have prolonged the discovery process have contributed substantially to delays in processing rate cases by requiring extended suspension of the procedural schedules. Although some parties attribute the responsibility for these delays to the Board itself, from our vantage point, it appears that delays in some cases are caused, at least

---

[1] We have also adopted procedures for handling "smaller" rate cases in which it would be impractical to use SAC, and we are proposing, in another proceeding, to minimize the filing fees in such cases. See Regulations Governing Fees for Services Performed in Connection with Licensing and Related Services — 2002 New Fees, STB Ex Parte No. 542 (Sub-No. 4) (STB served Sept. 4, 2002).

in part, by the discovery practices of the complaining shippers[2] or the defendant railroads,[3] and sometimes both parties may have contributed to a delay.[4] Our objective here is not to attribute blame for the length of time these cases take to come to resolution, but rather to develop constructive procedures to eliminate needless sources of such "front end" delay so that procedural schedules can be established and met, and cases can be moved to resolution. Toward this end we are proposing to change both our discovery standard and the way we handle discovery disputes in rate cases considered under the SAC methodology.

Of course, a more efficient means of moving a rate dispute toward quick resolution at an early stage is by bringing the parties together outside of the adjudicatory context. There has long been interest in Congress in alternative dispute resolution as a mechanism for quickly ruling on rate disputes. We already have various alternative dispute resolution mechanisms in place, see 49 CFR parts 1108 and 1109, as well as a requirement that rail rate complaints contain a statement that the use of arbitration has been considered, see 49 CFR 1111.1(a)(11). And recently, we conducted a proceeding to develop a record for Congress on possible use of alternative dispute resolution for small rail rate disputes. See Arbitration — Various Matters Relating to its Use as an Effective Means of Resolving Disputes That are Subject to the Board's Jurisdiction, STB Ex Parte No. 586 (STB served Sept. 20, 2001 and May 22, 2002). Although the public reaction in that proceeding was mixed, we continue to believe that private sector solutions are the most efficient way of resolving disputes.[5]

Thus, in this proceeding, we are proposing to institute a requirement that a shipper seeking relief from a railroad in a large rate case engage in non-binding mediation of its dispute with the railroad prior to filing its complaint with us. Mandatory mediation might allow shippers

---

[2] See, e.g., Public Serv. Co. of Colorado v. Burlington N. & S.F. Ry., STB Docket No. 42057 (STB served July 2, 2002).

[3] See, e.g., Duke Energy Corp. v. Norfolk S. Ry., STB Docket No. 42069 (STB served July 26, 2002.

[4] See, e.g., Northern States Power Co. Minnesota v. Union Pac. R.R., STB Docket No. 42059 (STB served May 24, 2002) at 3.

[5] A summary of the comments received on arbitration in that proceeding has been submitted by letter of May 22, 2002 from Chairman Morgan to the Senate Committee on Commerce, Science and Transportation for its information.

and railroads to settle rate disputes — in whole or in part — in a more flexible, less costly, less time-consuming, and less confrontational environment.[6]

MANDATORY MEDIATION

Under our proposal, the shipper would file a request for mediation with the Board, indicating its intent to file a complaint alleging a violation of the rate reasonableness requirement contained in 49 U.S.C. 10701 and 10704. This request would engage Board processes and serve to fix the relevant limitations period for any relief for rates or charges already paid, just as the filing of a formal complaint does. The request for mediation would need to specify the relevant facts and nature of the dispute in sufficient detail to frame the issues requiring mediation, and the shipper would be required to serve a copy on the defendant railroad in the manner specified in the Board's rules. The mediation triggered by the filing of such a request would be conducted by a mediator, assigned by the Board within 5 business days of our receipt of the shipper's request.[7] The Board would not impose any filing fees for requests for mediation, and the mediator's services would be paid for by the Board.

The mediator would work with the parties to try to reach a settlement. If the parties reached a settlement, the mediator could assist in preparing a settlement agreement. If the parties failed to reach any resolution, the shipper could proceed to file a formal complaint with the Board. Even if the parties were unable to fully resolve the dispute through mediation, however, they might be able to narrow the issues in dispute, and reach stipulations that they would incorporate into any subsequent adjudication before the Board. If the parties reached a partial settlement, the shipper could proceed to file a formal complaint with the Board on the remaining issues, which would be handled under the Board's existing rules.

Within 5 business days of the assignment to mediate, the mediator would contact the parties to discuss ground rules and the time and location of any meeting. The precise procedure that would be used to facilitate the mediation would be flexible and left up to the mediator's discretion, who might for example conduct joint and separate meetings with each party. All procedures used would be designed to avoid imposing significant resource burdens on either party and would in all events be informal. The entire mediation process would be private and confidential, and would be completed within 60 days of the filing of the shipper's request. If the mediation process could not be completed in 60 days, a request for an extension could be filed by

---

[6] The mediation to be mandated here must be non-binding because, as the Board has explained in prior decisions, mediation (and arbitration) can be binding only if provided for by law.

[7] The Board expects to use Administrative Law Judges from the Federal Energy Regulatory Commission, as it has in the past, to conduct the mediation.

the mediator, after consultation with the parties, prior to the end of the 60 day period, and could be considered by the Board.

MORE RESTRICTIVE DISCOVERY STANDARDS

Should mediation not be successful, the shipper could then file its rate complaint. In light of the concerns with discovery discussed above, we propose to sharply restrict the scope of discovery in SAC rate cases. Our standards for seeking discovery in these cases are currently the same liberal standards provided for in other proceedings before us. Under 49 CFR 1114.21, once a complaint is filed, parties generally may obtain discovery regarding any matter that is relevant and not privileged. Indeed, it is not even grounds for objection that the information sought would be inadmissible as evidence, so long as the information sought could lead to the discovery of admissible evidence. Sometimes, given these liberal rules, discovery can be counterproductive to our prompt resolution of rail rate proceedings.

Therefore, to prevent discovery from being used for the sake of delay and harassment, or from becoming unduly burdensome and overwhelming the process, we believe it is necessary and appropriate to curb discovery in SAC cases. We are accordingly proposing more restrictive standards for discovery in these cases. Under the proposed stricter standards, relevance alone would not be enough to warrant discovery in a SAC case; the party seeking discovery would have to have a clear, demonstrable need for the information in order to make its case, and the information would have to be such that it would not be readily available to that party through other means.

We understand that in SAC cases a shipper typically needs a certain amount of discovery if (as is usually the case) its SAC presentation would be based on replicating lines of the defendant railroad and carrying other traffic handled by the defendant. There have been instances, however, in which shippers' discovery requests have been clearly excessive, and under our proposed new procedures we would not sanction such requests.

As a general rule, we see less need for extensive discovery by a railroad. Railroads should already be cognizant of any inter- or intramodal transportation alternatives available for the traffic at issue, and they are generally quite capable of assessing and critiquing the shipper's SAC presentation using their own experts' or other publicly available information. Thus, we would look skeptically at railroad attempts to obtain extensive discovery in these cases.

MOTIONS TO COMPEL

To provide a quick process for resolving discovery disputes that do arise, we would continue to permit parties to file motions to compel information not willingly provided by the opposing party in accordance with 49 CFR 1114.31. However, we seek to encourage parties to resolve discovery disputes themselves, rather than bringing the disputes to the Board in the form

of motions to compel. Such motions to compel consume substantial staff effort and have in the past taken several months to resolve. Thus, motions to compel can slow down the process and can be used to delay the resolution of cases. We should note that, in a separate proceeding (Ex Parte No. 542 (Sub-No. 4)), we have proposed a new $2,300 fee for filing such requests for motions to compel discovery and have proposed that the losing party (with respect to the motion to compel) bear responsibility for the fee.

EXPEDITED PROCESS FOR RESOLVING DISCOVERY DISPUTES

When a motion to compel is filed, we propose to expedite the process by requiring the reply to be filed within 10 days. Further, we propose to permit Board staff to confer with both parties simultaneously and on an expedited basis to discuss the motions, so that the staff may assist in expediting a ruling.

Under this proposal, the staff could convene an informal conference with the parties within 5 business days after the reply to the motion to compel is filed, to discuss the dispute, attempt to narrow the issues, and gather any further information needed to render a decision. The Secretary would then issue a summary ruling on the dispute within 5 business days of this conference, or, if no conference is held, within 10 business days after the reply to the motion to compel is filed. The Secretary's ruling would be appealable to the entire Board, as it would be today.

SUMMARY

These proposals regarding mediation and discovery are intended to move SAC rate cases to resolution more expeditiously. The text of the proposed amendments to our regulations is set forth in the attached Appendix. We invite comments from the public on any and all aspects of the foregoing proposals and the Appendix.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

We tentatively conclude that our action will not have a significant effect on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

It is ordered:

1. Notice of this decision shall be published in the Federal Register.

2. An original and 10 copies of written comments on the proposals set forth in this decision are due on October 9, 2002, and reply comments are due 20 days thereafter.

3. This decision is effective on the service date.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams
Secretary

APPENDIX

For the reasons set forth in the decision, the Surface Transportation Board proposes to amend 49 CFR parts 1109 and 1114 as follows:

PART 1109 — USE OF ALTERNATIVE DISPUTE RESOLUTION IN BOARD PROCEEDINGS AND THOSE IN WHICH THE BOARD IS A PARTY

Add new section 1109.4, *Mandatory Mediation in Rate Cases to be Considered Under the Stand-Alone Cost Methodology*, as follows:

1109.4 *Mandatory Mediation in Rate Cases to be Considered Under the Stand-Alone Cost Methodology*.

(a) A shipper seeking rate relief from a railroad or railroads in a case involving the stand-alone cost methodology must engage in non-binding mediation of its dispute with the railroad prior to filing a formal complaint under Part 1111.

(b) The shipper must file a request for mediation with the Board, indicating its intent to file a complaint alleging a violation of 49 U.S.C. 10701 and 10704. This request will engage the Board's processes and serve to fix the relevant limitations period for any relief for rates or charges already paid, just as would the filing of a formal complaint. The request for mediation must specify the relevant facts and nature of the dispute in sufficient detail to frame the issues requiring mediation. The shipper must serve a copy of its request on the defendant railroad as specified in Sec. 1104.12. A mediator will be assigned by the Board within 5 business days of filing of the shipper's request.

(c) The mediator will work with the parties to try to reach a settlement of all or some of their dispute or to narrow the issues in dispute, and reach stipulations that may be incorporated into any subsequent adjudication before the Board if mediation does not fully resolve the dispute.

(d) If the parties reach a settlement, the mediator may assist in preparing a settlement agreement. If the parties fail to reach a settlement, the shipper may proceed to file a formal complaint with the Board. If the parties reach a partial settlement, the shipper may proceed to file a formal complaint with the Board on the remaining issues, which will be handled under the Board's existing rules.

(e) Within 5 business days of the assignment to mediate, the mediator shall contact the parties to discuss ground rules and the time and location of any meeting. The precise procedure used to facilitate the mediation is flexible and is within the mediator's discretion.

(f) The entire mediation process shall be private and confidential, and shall be completed within 60 days of the filing of the shipper's request. If the mediation process cannot be completed in 60 days, a request for an extension may be filed by the mediator, after consultation with the parties, prior to the end of the 60 day period, and may be considered by the Board.

PART 1114 — EVIDENCE; DISCOVERY

1. Revise section 1114.21, *Applicability; general provisions*, as follows:
a. Revise the first sentence of paragraph (a)(1) to read as follows:

(a) *When discovery is available.* (1) Parties may obtain discovery under this subpart regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding other than an informal proceeding or a rate case to be considered under the stand-alone cost methodology. * * *

b. Redesignate current paragraphs (b) – (f) as (c) – (g).

c. Add new paragraph (b):

(b) *Discovery in stand-alone cost rate cases.* In a rate case to be considered under the stand-alone cost methodology, parties may obtain discovery only of information for which the party seeking discovery has a clear, demonstrable need in order to make its case and which is not readily available to it through means other than discovery.

2. Add to section 1114.31, *Failure to respond to discovery*, new paragraphs (a)(1) - (4) as follows:

(a) * * * * *
(1) *Reply to motion to compel generally.* Except in rate cases to be considered under the stand-alone cost methodology, the time for filing a reply to a motion to compel is governed by Sec. 1104.13.

(2) *Reply to motion to compel in stand-alone cost rate cases.* A reply to a motion to compel must be filed with the Board within 10 days thereafter in a rate case to be considered under the stand-alone cost methodology.

(3) *Conference with parties.* Within 5 business days after the filing of a reply to a motion to compel in a rate case to be considered under the stand-alone cost methodology, Board staff may convene an informal conference with the parties to discuss the dispute, attempt to narrow the issues, and gather any further information needed to render a ruling.

(4) *Ruling on motion to compel in stand-alone cost rate cases.* Within 5 business days after a conference with the parties convened pursuant to subparagraph (a)(3) of this section, the Secretary will issue a summary ruling on the motion to compel discovery in a stand-alone cost rate case. If no conference is convened, the Secretary will issue this summary ruling within 10 business days after the filing of the reply to the motion to compel.